A

COURTS MAMMOTH BHD

v.

SUBRAMANIAM PARAMASIVAM

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S6-22-1191-2003]
8 FEBRUARY 2007

C ***CIVIL PROCEDURE:*** *Time - Extension of time - Application for - Failure to file affidavit-in-reply within time frame fixed by court - Whether entirely due to extraneous circumstances - Justice of case - Whether there were any exceptional circumstances to refuse application - Whether delay in filing application a non-issue*

D

This was an application by the plaintiff for an extension of time to file an affidavit-in-reply to the defendant's affidavit-in-reply. The plaintiff submitted that its failure to file its affidavit-in-reply within the time frame fixed by this court was entirely due to extraneous
E circumstances. It seemed that the purported accounts produced by the defendant through the defendant's second affidavit ('defendant's purported accounts') were incomplete, insufficient and did not comply with the order of this court dated 8 July 2004, and that this considerably delayed the plaintiff in the
F preparation of its affidavit-in-reply.

Held (allowing the plaintiff's application):

(1) In the circumstances, and taking into account that the plaintiff had to examine the defendant's incomplete and insufficient
G information and documents which were voluminous, it was certainly reasonable for the plaintiff to apply for an extension of time to file its affidavit-in-reply to the defendant's second affidavit. In this way, the plaintiff would be accorded the opportunity to challenge the defendant's purported accounts.
H The justice of the case lay in favour of the plaintiff, and an extension of time for the plaintiff to file its affidavit-in-reply would not cause any prejudice or detriment to the defendant that could not be compensated by costs. It was also rightly pointed out that the plaintiff would suffer grave injustice if its
I application for an extension of time were not allowed, bearing in mind that the defendant's purported accounts were not in

compliance with this court's order dated 8 July 2004. It was emphasised that the plaintiff's affidavit-in-reply was essential to ascertain the true affairs of the defendant's purported accounts. It was also emphasised that the plaintiff's application was with merit and that this was proved by the incompleteness of the defendant's purported accounts. The defendant, however, had not shown that the present case herein was a special case or that there were any exceptional circumstances to refuse the plaintiff's application. Regarding the defendant's allegation that there was a delay of four months before the plaintiff filed this application, the plaintiff had informed the defendant through its solicitors of its intention to file an affidavit-in-reply and the plaintiff had also requested for an extension of time to file the affidavit-in-reply. Numerous messages were relayed to the defendant's solicitors through the plaintiff's solicitors but, unfortunately, the defendant did not respond at all. In short, the delay was a non-issue. The defendant knew that the plaintiff wanted to file an affidavit-in-reply. (paras 10, 12, 13, 14 & 15)

Case(s) referred to:

Alfred Dunhill Limited And Another v. Sunoptic SA And Another [1979] FSR 337 ***(refd)***

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Atwood v. Chichester [1878] 3 QBD 722 ***(refd)***

Costellow v. Somerset County Council [1993] 1 All ER 952 ***(refd)***

Dyncast Pte Ltd v. Lim Meng Siang & Ors [1989] 2 CLJ 1116; [1989] 2 CLJ (Rep) 900 HC ***(refd)***

Harrison v. Bottenheim [1878] 26 WR 362 ***(refd)***

Hau Euv Tiam v. Phang Kui Fatt & 2 Ors [1999] 4 CLJ 395 HC ***(refd)***

Kulanthayar Chettiar v. Koh Liak Phuang [1951] MLJ 149 ***(refd)***

Lumley v. Osborne [1901] 1 KB 532 ***(refd)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(refd)***

R v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd [1976] 1 All ER 897 ***(refd)***

Re JL Young Manufacturing Co Ltd [1900] 2 Ch 753 ***(refd)***

The Bonito; Owners Of The Ship Or Vessel "Bonito" v. Owners Of The Ships Or Vessels "Ah Lam II" And "PU 1804" [2001] 3 SLR 32 ***(refd)***

The Tokai Maru [1998] 3 SLR 105 ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [1998] 4 CLJ 883 CA ***(refd)***

Voon Mow Chen v. Menteri Dalam Negeri & Anor [1993] 4 CLJ 195 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 5(1), O. 32 r. 13(2)

For the plaintiff - Jo Tiong Hui Ling; M/s SK Yeoh & Partners

For the defendant - Wan Idi Amin Ibrahim; M/s Adliza Subra And Partners

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Enclosure 17

[1] This was the plaintiff's application for extension of time to file an affidavit in reply to the defendant's affidavit in reply. It was in the nature of an interlocutory application. Every application in chambers is supported by an affidavit. Every legal practitioner knows that an affidavit is a sworn statement which can be used as evidence of the matters deposed thereto. Roskill LJ in *Alfred Dunhill Limited And Another v. Sunoptic S.A. And Another* [1979] FSR 337, 352 observed that:

> Affidavits are designed to place facts, whether disputed or otherwise, before the tribunal for whose help they are prepared. They are not designed as a receptacle for or as a vehicle for legal arguments. Draftsmen of affidavits should not, as a general rule, put into the mouths of the intended deponents legal arguments of which those deponents are unlikely ever to have heard. Legal arguments, especially in interlocutory proceedings, should come from the mouths of those best qualified to advance them and not be put into the mouths of the deponents. There has been much unnecessary paper in this case brought about by the inclusion of legal arguments in affidavits.

What To Incorporate In An Affidavit?

[2] It is always prudent when drafting an affidavit to incorporate the following particulars:

(a) the title of the action;

(b) the deponent's name, address and occupation;

(c) to state whether the deponent is employed by the party to the action;

(d) it must always be expressed in the first person;

(e) for coherence, it must be divided into numbered paragraphs;

(f) that the dates, sums and other numbers must be written in figures and not in words; and

(g) that it must be indorsed with a note showing on whose behalf the affidavit is being filed.

[3] It is also prudent to bear in mind that every affidavit must bear the signature of the deponent and the jurat must be completed and signed by the person before whom it is sworn. A jurat is a certificate of the administering officer or a person before whom the affidavit was sworn. It refers to that part of the clause written at the foot of an affidavit, more to the lower portion, stating, *inter alia*, when, where and before whom such an affidavit was sworn. If an affidavit is defective, it shall not be used in evidence (*Voon Mow Chen v. Menteri Dalam Negeri & Anor* [1993] 4 CLJ 195; and *Hau Euu Tiam v. Phang Kui Fatt & 2 Ors* [1999] 4 CLJ 395). The affidavit may contain only such facts as the deponent is able of his own knowledge to prove. The source of the information and the grounds thereof must also be stated and once stated it may contain hearsay evidence (*Harrison v. Bottenheim* [1878] 26 WR 362). An affidavit of information and belief which do not state the source of the information or belief, is irregular and inadmissible as evidence and this is so whether the affidavit is used at an interlocutory stage or on a final application (*Re J.L. Young Manufacturing Co Ltd* [1900] 2 Ch 753 CA; *Lumley v Osborne* [1901] 1 KB 532; and *Kulanthayar Chettiar v. Koh Liak Phuang* [1951] MLJ 149). The court has the inherent discretion to strike out the offending parts of the affidavit and allow the rest of the contents of the affidavit to remain on record (*Dyncast Pte Ltd v. Lim Meng Siang & Ors* [1989] 2 CLJ 1116; [1989] 2 CLJ (Rep) 900). An affidavit in reply must specifically reply to the allegations of fact and not law as affirmed in an affidavit. And that the failure to reply specifically to any allegations may be fatal. At this juncture, it is ideal to refer to the judgment of Lee Hun Hoe

CJ (Borneo) in *Alloy Automotive Sdn. Bhd. v Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45. There his Lordship observed that:

> In his affidavit dated April 30, 1984 Choo Chak Low did not answer the matters raised in the above affidavit of Liew Mook. There is force in the appellant's contention that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted.

It is appropriate to restate the law, once again, in that where a case is to be decided on contest of affidavits, the rule is clear. It is this. That material allegations which are not contradicted are deemed to be admitted (*Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82). Now, O. 32 r. 13(2) of the Rules of the High Court 1980 ("RHC") makes it mandatory for an affidavit in reply to be filed and served within 14 days from the time the affidavit that it seeks to reply is received. If there is any delay, like what had happened here, the plaintiff may apply for an abridgement of the period required to file the affidavit in reply pursuant to O. 3 r. 5(1) of the RHC (*Perbadanan Nasional Insurans Sdn Bhd (Dahulunya dikenali sebagai Union Insurance Malaysia Sdn Bhd) v. Pua Lai Ong* [1996] 3 CLJ 321).

The Jurisdiction Of This Court To Grant An Extension Of Time

[4] Order 3 r. 5(1) of the RHC states as follows:

> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings.

In *Thiruchelvasegaram a/l Manickavasegar v. Mahadevi a/p Nadchatiram* [1998] 4 MLJ 297, the Court of Appeal held that (see the headnotes at p. 297):

> Under O. 3 r. 5(1) and (2) of the Rules of the High Court 1980 ('the RHC'), the court has jurisdiction to extend time even if the application is made after the expiry of the period. The primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.

In *R v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd* [1976] 1 All ER 897, [1976] 1 WLR 362, CA, the headnotes carry the following recitals:

> The county court had a wide inherent jurisdiction to control its own procedure. That included the power to enlarge or extend any time limits attaching to an order granted at an earlier hearing by a different judge. The court's powers were not limited to what was expressly stated in the rules of practice and applied even where the application for an extension of time was made after the relevant period had elapsed.

The Background Facts And The Analysis Thereto

[5] This court granted the plaintiff's request to adjourn the hearing date from 13 September 2004 to 11 October 2004. The plaintiff accepted the defendant's second affidavit and requested for time from this court to file a reply on or before 5 November 2004. It seemed that the defendant only served the defendant's second affidavit on the plaintiff's solicitors on 14 September 2004 – which was one week later than the date fixed by the court order. Unfortunately, the plaintiff was unable to file its affidavit in reply to the defendant's second affidavit on 5 November 2004. It was for this reason that the plaintiff filed an application for abridgement of time to file an affidavit in reply as seen in encl. 17.

[6] The stand of the plaintiff was this. That it has no intention to ignore or flout the order of this court and that the plaintiff's failure to file the plaintiff's affidavit in reply within the time frame fixed by this court was entirely due to extraneous circumstances. It seemed that the purported accounts produced by the defendant through the defendant's second affidavit (hereinafter referred to as the "defendant's purported accounts") were incomplete, insufficient and did not comply with the order dated 8 July 2004. The defendant's purported accounts failed to provide the complete or the full particulars required by the order of this court dated 8 July 2004. Now, the order of this court dated 8 July 2004 sets out the following orders:

(a) That the defendant do, within two months from 8 July 2004, file and serve on the plaintiff a complete and comprehensive account (together with all the supporting invoices, receipts, vouchers and other relevant documents) particularising and setting out all the following matters:

A (i) the status of all the litigation cases which were under the conduct of the defendant (hereinafter referred to as the "status report");

(ii) all monies paid by the plaintiff to the defendant pursuant B to the litigation cases particularly setting out how the defendant apportioned, appropriated, applied and/or expended such monies and identifying all monies (directly or indirectly) which are still under the control, possession and/or in the hands of the defendant; and

C (iii) all monies received by the defendant as agent or on behalf of the plaintiff howsoever arising from or incidental to the litigation cases including refunds from the court and/or proceeds from the execution of the writs of seizure and sale (hereinafter referred to as the "statement of account D of court refunds").

(b) That the plaintiff be at liberty to file a notice of objection or an affidavit in reply within 30 days after receipt of the defendant's affidavit and accounts.

E **[7]** It must be borne in mind that the defendant's purported accounts did not contain any complete or sufficient status report of all the litigation cases handled by the defendant and no supportive documents were produced to support or verify them. F Furthermore, the defendant's purported accounts did not contain the complete or sufficient statement to show all the monies paid by the plaintiff to the defendant pursuant to the litigation cases handled by the defendant nor did it contain the statement of account of court refunds and no supportive documents were G produced to support or verify them. What the defendant did was to produce statements and exhibited them in a haphazard manner, without order or system. For instance, the defendant provided no status report of all the litigation cases handled by the defendant for the following matters:

H (a) exhibit "SP1A" (at p. 7), at items 2 and 8 (Johor Bahru), at items 1 and 2 (Kluang), at item 1 (Segamat) and at item 1 (Kulai);

(b) exhibit "SP1B" (at p. 8), at items 1, 4 and 30;

I (c) exhibit "SP1B" (at p. 9), at items 8, 14, 22, 24, 26, 30, 35 and 36;

(d) exhibit "SP1B" (at p. 10), at items 6 and 11 (Kuala Kangsar), and at items 2 and 3 (Sitiawan); and

(e) exhibit "SP1C" (at p. 11), at items 1, 2, 4 to 18, 20 to 24, 26 to 31, 58 to 59, 61 to 69, 71 to 74, 75, 79 to 82, 84, 87, 91 to 92, 94 to 96, 99 to 103, 105 to 109, 111 to 114, 116, 117, 119 to 121, 123, 124, 126 to 133, 135 to 142, 144 to 145, 147 to 151, 156 to 157, 160, 162 to 164, 166 to 171, 173 to 176, 178 to 184, 186 to 188, 190, 192, 194 to 204, 206, 208, 209 and 212 to 218.

[8] The defendant's purported accounts were so disorganised and insufficient to such an extent that the plaintiff found that it was difficult to understand or comprehend them and the plaintiff took extra pains and efforts in examining and verifying each and every alleged information and documents as set out in the defendant's purported accounts. It was averred by the plaintiff that without any complete or sufficient information, accompanied with the relevant documents and the status report of all the litigation cases handled by the defendant, every single allegation and exhibit had to be individually examined and cross-checked against the plaintiff's own records. It was quite obvious that the defendant's purported accounts did not comply with the order of this court dated 8 July 2004. Insufficient particulars were advanced in regard to the following matters:

(a) as to how the defendant had apportioned, appropriated, applied and/or expended the monies paid by the plaintiff as legal fees and disbursements; and

(b) as to how the defendant had apportioned, appropriated, applied and/or expended the monies received by the defendant styled as the statement of account of court refunds.

The defendant also failed to provide any or any sufficient supporting invoices, receipts, vouchers and other relevant documents to support the defendant's allegations pertaining to the appropriation, application and expenditure of the monies. For all the varied reasons, the plaintiff reiterated, time and again, that the defendant's purported accounts did not comply with the order of this court dated 8 July 2004.

[9] It must be borne in mind that the defendant *via* his second affidavit at para. 4 thereto, in no uncertain terms, admitted that the defendant's purported accounts were not complete and were not in compliance with the order of this court dated 8 July 2004 and that the defendant was still gathering documents and bills which, according to the defendant, he would annex them as exhibits to another affidavit. Unfortunately, till to date, the defendant has not done so.

[10] Furthermore, the defendant's purported accounts contained numerous and substantial discrepancies, errors and inaccuracies. And this further delayed the plaintiff's attempt in preparing its affidavit in reply. The plaintiff averred that it has completed its examination and verification of the defendant's purported accounts and, in the course of which, the plaintiff has discovered numerous and substantial discrepancies, errors and inaccuracies and the particulars thereto may be stated as follows:

(a) the plaintiff's list of objections to the defendant's purported accounts as set out in the defendant's second affidavit as per exh. "SP3" of Part 1 (at pp. 1 to 70) and marked as exh. "NAE1"; and

(b) the plaintiff's list of objections to the defendant's purported accounts as set out in the defendant's second affidavit as per exh. "SP3" of Part 1 (at pp. 71 to 200) and Part 2 (at pp. 201 to 385) and marked therein as exh. "NAE2".

It was averred that the contents of exhs. "NAE1" and "NAE2" will form the substantial portion of the plaintiff's affidavit in reply to the defendant's second affidavit. In the circumstances, and taking into account that the plaintiff had to examine the incomplete and insufficient information and documents which were voluminous amounting to 591 pages in all, it was certainly reasonable for the plaintiff to apply for an extension of time to file the plaintiff's affidavit in reply to the defendant's second affidavit. In this way, the plaintiff would be accorded the opportunity to challenge the defendant's purported accounts. It was emphasised by the plaintiff that the defendant only managed to file and serve the defendant's first affidavit some six months after receipt of the plaintiff's first affidavit.

[11] It must be borne in mind that the plaintiff did, through its solicitors Messrs S K Yeoh & Partners, inform the defendant's solicitors that the plaintiff required additional time to file the plaintiff's affidavit in reply. The plaintiff's solicitors left messages to the defendant's solicitors to return call but, alas, no return call was ever received by the plaintiff's solicitors. It goes without saying that the court will ordinarily extend time where any injury caused by the delay may be compensated by the payment of costs (*Atwood v. Chichester* [1878] 3 QBD 722). Sir Thomas Bingham MR in *Costellow v. Somerset County Council* [1993] 1 All ER 952, 959, [1993] 1 WLR 256, 263 aptly said:

> … that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.

[12] Where does the justice of the case lie? In my judgment, the justice of the case lies in favour of the plaintiff and an extension of time for the plaintiff to file the plaintiff's affidavit in reply to the defendant's second affidavit would not cause any prejudice or detriment to the defendant which cannot be compensated by costs. The defendant argued that the defendant would be prejudiced as the defendant will have difficulty in obtaining verification with respect to the defendant's purported accounts from the defendant's employees who have since left the defendant's company. With all due respect, the defendant's allegations were without basis for the following reasons:

(a) The defendant already knew that the defendant's purported accounts was incomplete at the time when the defendant filed the defendant's second affidavit (see para. 4 of the defendant's second affidavit). It must be recalled to mind, for fear of repetition, that the defendant was still gathering documents and bills which he would incorporate in his next affidavit but which he did not do so until now. According to the plaintiff, this showed that the defendant did not have any other documents and bills save and except those that were exhibited in the defendant's first and second affidavits.

(b) That the defendant's first and second affidavits were in fact affirmed by the defendant himself – a lawyer by profession. Surely the defendant has had knowledge of all the accounts that were set out in the defendant's first and second affidavits.

In my judgment, for all these reasons, the timing of the filing of the plaintiff's affidavit in reply has had no impact whatsoever with regard to the defendant's purported verification process.

[13] It was rightly pointed out that the plaintiff would suffer grave injustice if the plaintiff's application for extension of time was not allowed by this court bearing in mind that the defendant's purported accounts were not in compliance with the order of this court dated 8 July 2004. It was emphasised that the plaintiff's affidavit in reply was essential to ascertain the true affairs of the defendant's purported accounts. It was also emphasised that the plaintiff's application in encl. 17 was with merit and that this was proven by the incompleteness of the defendant's purported accounts. In *The Tokai Maru* [1998] 3 SLR 105, 113, the Singapore's Court of Appeal quoted favourably the following speech of Sir Thomas Bingham MR in *Costellow v. Somerset County Council (supra)*:

> The approach to applications under O. 3 r. 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under O. 3 r. 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.

[14] The defendant too has not shown that the present case herein was a special case or there were any exceptional circumstances to refuse the plaintiff's application in encl. 17. In *The Bonito; Owners Of The Ship Or Vessel "Bonito" v. Owners Of The Ships Or Vessels "Ah Lam II" And "PU 1804"* [2001] 3 SLR 32, 39, the Singapore's Court of Appeal had this to say:

> 18. In exercising his discretion the judge took into consideration the relevant matters. One of the matters he considered most carefully was the likelihood of prejudice to the appellants. He found that no prejudice would be caused to the appellants by granting the extension of time. He said at P 23-25:

23. Having regard to all the circumstances I am satisfied that an extension of time as asked for by the plaintiffs will not cause any prejudice to the defendants for which they cannot be compensated by an award of costs. An extension of time in favour of one party in a sense causes an injustice to the other just as the refusal to grant an extension of time causes an injustice to the party out of time but here I think the balance of justice favours the making of an order to extend time. It remains to consider whether this is a special case or if there are any exceptional circumstances to refuse the extension of time asked for.

[15] The defendant alleged that there was a delay of four (4) months before the plaintiff filed the application in encl. 17. It must be borne in mind that the delay can easily be explained. As stated earlier, the plaintiff has informed the defendant through the plaintiff's solicitors of the plaintiff's intention to file an affidavit in reply and the plaintiff too had requested for an extension of time to file the affidavit in reply. Numerous messages were relayed to the defendant's solicitors through the plaintiff's solicitors but, unfortunately, the defendant did not respond at all. In short, the delay was a non-issue. The defendant knew that the plaintiff wanted to file an affidavit in reply.

Conclusion

[16] For the reasons as adumbrated above, I allowed the plaintiff's application for an extension of time to file an affidavit in reply. I acceded to the plaintiff's application in encl. 17. I gave an order in terms of encl. 17 for prayers (1) and (2). I too allowed the defendant to file an affidavit in reply as a result of my decision in allowing encl. 17.